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No. 95-_____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

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SUPREME COURT, U.S.

MICHAEL A. WHREN and JAMES L. BROWN,

PETITIONERS,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

Supreme Court, U.S.
FILED
AUG 31 1995
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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether a pretextual traffic stop undertaken by officers who were prohibited by police department regulations from making traffic stops was objectively unreasonable under the Fourth Amendment where no reasonable officer in those circumstances would have made such a stop (the test used by the Ninth, Tenth and Eleventh Circuits) or whether such stop was permissible as long as it could have been made because of a traffic violation (the test used by the D.C. Circuit in this case, and the Second, Third, Fourth, Fifth, Sixth, Seventh and Eighth Circuits).

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**IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995**

MICHAEL A. WHREN and JAMES L. BROWN,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

The petitioners, Michael A. Whren and James L. Brown, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINION BELOW

The decision of the United States Court of Appeals for the District of Columbia Circuit is reported at United States v. Whren, 53 F.3d 371 (D.C. Cir. 1995), and is reproduced in the Appendix to this Petition (App. 1-6). The district court did not issue a written opinion in this case.

JURISDICTION

The judgment of the Court of Appeals was entered on May 12, 1995. The Court of Appeals denied petitioners' joint petition for rehearing on July 13, 1995 (App. 7). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND REGULATION INVOLVED

The Fourth Amendment to the United States Constitution provides in relevant part:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated

Also at issue is District of Columbia Metropolitan Police Department General Order 303.1(I)(A)(2)(a) (effective July 29, 1986), which provides:

Only on-duty uniformed members driving marked departmental vehicles or members of the Public Vehicle Enforcement Unit, Traffic Enforcement Branch, shall take enforcement action; except in the case of a violation that is so grave as to pose an immediate threat to the safety of others, in which case members who are off duty, not in uniform, or in unmarked cruisers, may take appropriate enforcement action.

STATEMENT OF THE CASE

I. Introduction

This case arose because the sight of two young black males in a late model Nissan Pathfinder bearing temporary tags, pausing at a stop sign in Southeast Washington, D.C., aroused the suspicion of an unmarked car full of plainclothes vice officers patrolling for narcotics violations. Turning around to investigate, the officers saw the Pathfinder commit three minor traffic violations before they stopped it a few blocks away and discovered the drugs at issue in this case. This case warrants Supreme Court review because the decision of the Court of Appeals takes the wrong side in a circuit split over the proper Fourth Amendment standard for judging pretextual traffic stops -- a recurring issue that affects all motorists.

This Court should adopt the following Fourth Amendment rule, which differs by only one crucial word from that adopted by the D.C. Circuit in this case: "[R]egardless of whether a police officer subjectively believes that the occupants of an automobile may be engaging in some other illegal behavior, a traffic stop is permissible as long as a reasonable officer in the same circumstances [would] have stopped the car for the suspected traffic violation." Whren, 53 F.3d at 375 (inserting "would" for "could").

The decision of the court below that such stops are valid so long as they "could have" been made on the basis of a traffic violation, while in accord with the rule in the majority of other circuits (the Second, Third, Fourth, Fifth, Sixth, Seventh and Eighth), imposes no practical limitation on police discretion. The better view, adopted by the Ninth, Tenth and Eleventh Circuits, holds that a pretextual stop is reasonable under the Fourth Amendment as long as a reasonable officer "would have" made the traffic stop in question.

Both tests consider only the objective facts of the stop. Neither test involves inquiry into the subjective motivations of the police. Under both tests, the vast majority of pretextual traffic stops are upheld as consistent with the Fourth Amendment. The "would have" test is the appropriate Fourth Amendment standard because it provides for meaningful judicial review of the "reasonableness" of discretionary police action. Here, the stop of the Pathfinder was unreasonable under the Fourth Amendment: No

reasonable officer would have made this traffic stop because it was expressly prohibited by police regulation.

II. Statement of Facts

At 8:25 p.m., on June 10, 1993, District of Columbia Metropolitan Police Department vice officers Efrain Soto and Homer Littlejohn and seven or eight other plainclothes officers were patrolling for drug violations in Southeast Washington, D.C. in two unmarked cars. Whren, 53 F.3d at 372. As the car in which Soto and Littlejohn were patrolling turned left off of Ely Place onto 37th Place heading north, they noticed a recent model Pathfinder with temporary tags stopped at the stop sign on 37th Place where that street deadends into a T-intersection with Ely Place. Id. The driver, Petitioner Brown, was looking down into the lap area of the passenger, Petitioner Whren. Id. Soto testified that the Pathfinder paused at the intersection, with at least one car behind it, for more than twenty seconds. Id.¹

As the officers made a U-turn to follow the Pathfinder, Soto saw the Pathfinder turn right onto Ely Place without signalling and drive west towards Minnesota Avenue at what he described as an "unreasonable speed." Id.² The officers completed their U-turn

¹ Officer Littlejohn testified that there were no vehicles waiting behind the Pathfinder (Tr. 114, 115).

² Officer Littlejohn never claimed to see either the alleged failure to signal or the alleged speeding. To the contrary, he testified that the stop was based on "reasonable suspicion" and elaborated (Tr. 116): "Sir, they were leaving a high drug area. We did not know they had drugs in that vehicle at that time, just had a reasonable suspicion as to their actions as to why they were stopped at the stop sign for so long." For obvious reasons, the government has never argued that two black males in an expensive

and followed the Pathfinder onto Ely Place where they caught up to it as it was stopped at the red light at Minnesota Avenue. Id. The unmarked car pulled up alongside the driver's side of the Pathfinder, facing into and obstructing oncoming traffic and, with the assistance of the second unmarked carload of plainclothes officers, pinning the Pathfinder in on all sides. Id. at 372-373.³

As Officer Soto approached the driver's side of the Pathfinder, he saw the passenger holding a plastic bag of what appeared to be crack cocaine in each hand. Id. Officer Soto opened the driver's side door, dove across the front seat and grabbed one of the bags out of Mr. Whren's hand. Id. at 373. Multiple officers descended on the Pathfinder, arresting petitioners and seizing additional crack cocaine and two tinfolies of marijuana/PCP. Id.

car pausing at a stop sign near a "high drug area" equals a "reasonable articulable suspicion" of anything. Rather, the government has relied solely on the alleged traffic violations as justification for the stop.

³ Metropolitan Police Department regulations governing permissible traffic enforcement action specifically prohibit the stop made in this case:

Only on-duty uniformed members driving marked departmental vehicles or members of the Public Vehicle Enforcement Unit, Traffic Enforcement Branch, shall take enforcement action; except in the case of a violation that is so grave as to pose an immediate threat to the safety of others, in which case members who are off duty, not in uniform, or in unmarked cruisers, may take appropriate enforcement action.

Metropolitan Police Department General Order 303.1(I)(A)(2)(a) (effective July 29, 1986).

III. Proceedings Below

Mr. Whren and Mr. Brown were charged in a four-count indictment with various federal drug offenses based on the contraband seized from the Pathfinder. Id. at 372. The district court (Hon. Norma Holloway Johnson) held an evidentiary hearing and denied petitioners' motions to suppress (id. at 373) (emphasis added):

There may be different ways in which one can interpret it but, truly, the facts of the stop were not controverted. There was nothing to really demonstrate that the actions of the officers were contrary to a normal traffic stop. It may not be what some of us believe should be done, or when it should be done, or how it should be done, but the facts stand uncontroverted and the Court is going to accept the testimony of Officer Soto.

Petitioners were convicted by a jury on all counts. Each was sentenced to 168 months of imprisonment to be followed by ten years of supervised release. Id.

On appeal, the D.C. Circuit held that the district court properly denied petitioners' motions to suppress. Explicitly rejecting the alternative "would have" test, the court adopted the Fourth Amendment rule that a traffic stop is always "reasonable" as long as the officer has observed traffic violations for which he could have stopped the car. Id. at 374-375. The Court found the stop in this case valid based on three traffic violations described in Officer Soto's testimony: Mr. Brown failed to give "full time and attention" to his driving (18 D.C.M.R. Vehicle and Traffic Regulations § 2213.4), turned without signalling, and drove away at an unreasonable speed. Id. at 376. The court found it irrelevant that the officers who made the stop were plainclothes vice officers

patrolling for narcotics violations, ignoring entirely the police regulation prohibiting traffic stops by such officers. Id.

REASONS FOR GRANTING THE PETITION

THIS COURT SHOULD GRANT REVIEW IN THIS CASE TO RESOLVE THE 8-3 CIRCUIT SPLIT AS TO THE PROPER TEST FOR EVALUATING PRETEXTUAL TRAFFIC STOPS UNDER THE FOURTH AMENDMENT.

A pretextual stop occurs when the police use a legal justification to make a stop in order to investigate a person for an unrelated serious crime for which they do not have the reasonable suspicion necessary to support a stop. United States v. Guzman, 864 F.2d 1512, 1515 (10th Cir. 1988). "The classic example, presented in this case, occurs wher an officer stops a driver for a minor traffic violation in order to investigate a hunch that the driver is engaged in illegal drug activity." Id.

Pretextual stops are permissible under the Fourth Amendment as long as they are objectively justified: "[T]he fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken, as long as the circumstances, viewed objectively, justify that action." Scott v. United States, 436 U.S. 134, 138 (1978) (emphasis supplied). The question that has split the circuits is which of two equally objective tests should be applied to determine when an allegedly pretextual stop was objectively justified.

With the addition of this case and a recent Third Circuit decision, eight circuits have now held that a pretextual traffic stop is valid so long as an officer legally could have stopped the

car in question because of a suspected traffic violation. See United States v. Johnson, 1995 U.S. App. LEXIS 22658 (3d Cir. Aug. 16, 1995); United States v. Scopo, 19 F.3d 777, 782-84 (2d Cir.), cert. denied, 115 S. Ct. 207 (1994); United States v. Ferguson, 8 F.3d 385, 389-91 (6th Cir. 1993) (en banc), cert. denied, 115 S. Ct. 97 (1994); United States v. Hasan El, 5 F.3d 726, 727 (4th Cir. 1993), cert. denied, 114 S. Ct. 1374 (1994); United States v. Cummins, 920 F.2d 498, 500-01 (8th Cir. 1990), cert. denied, 502 U.S. 962 (1991); United States v. Trigg, 878 F.2d 1037, 1039 (7th Cir. 1989), cert. denied, 502 U.S. 962 (1991). Cf. United States v. Causey, 834 F.2d 1179 (5th Cir. 1987) (en banc) (pretextual arrest on old warrant; test later applied to pretextual traffic stops).⁴

The Ninth, Tenth and Eleventh Circuits have held, however, that a pretextual stop is objectively justified only if, under the same circumstances, a reasonable officer would have made the stop in the absence of suspicions about other criminal activity. United States v. Cannon, 29 F.3d 472, 475-476 (9th Cir. 1994); United States v. Guzman, 864 F.2d 1512, 1517 (10th Cir. 1988); United States v. Smith, 799 F.2d 704, 709 (11th Cir. 1986).⁵ The "would have" standard inquires not only into the technical legality of a stop but also into whether it comported with reasonable police practices. Cannon, 29 F.3d at 476.

⁴ See also, e.g., State v. Lopez, 873 P.2d 1127 (Utah 1994); Garcia v. State, 827 S.W.2d 937 (Tex. Crim. App. 1992).

⁵ See also, e.g., State v. Izzo, 623 A.2d 1277, 1280 (Me. 1993); Kehoe v. State, 521 So.2d 1094, 1096-1097 (Fla. 1988).

The issue of pretextual traffic stops has been percolating in the circuits for several years. See Cummins v. United States, 502 U.S. 962 (1991) (White, J., describing circuit split in dissent from denial of certiorari). With the Ninth Circuit having recently adopted the minority test, see Cannon, *supra*, and the D.C. Circuit in this case and the Third Circuit in Johnson having just adopted the majority standard, this long-divisive issue has new currency and is in need of resolution by this Court.

I. The "Would Have" Test Involves No Inquiry Into The Subjective Motivations Of The Police.

The court below reasoned that the "objective 'could have' standard" is better than the "open-ended 'would have' standard" because it "eliminates the necessity for the court's inquiring into an officer's subjective state of mind." Whren, 53 F.3d at 375, citing Maryland v. Macon, 472 U.S. 463, 470-471 (1985). But the "would have" test is also a purely objective standard, looking at the objective circumstances through the eyes of a "reasonable officer," not at the subjective state of mind of the particular officer who made the stop. Cannon, 29 F.3d at 476; Guzman, 864 F.2d at 1515 ("objective analysis of the facts and circumstances of a pretextual stop is appropriate, rather than an inquiry into the officer's subjective intent"); Smith, 799 F.2d at 710 (proper focus is on "objective reasonableness rather than on subjective intent or theoretical possibility").⁶ By holding that "the proper basis of

⁶ The "objective nature of the pretext inquiry" has made it possible for the Tenth Circuit to apply the "would have" test on appeal even where the district court did not reach the issue. United States v. Betancur, 24 F.3d 73, 78 n.4 (10th Cir. 1994).

concern is not with why the officer deviated from the usual practice in this case but simply that he did deviate," Guzman, 864 F.2d at 1517 (quoting 1 W. LaFave, Search and Seizure § 1.4(e) at 94 (2d ed. 1987)), this test preserves the requirement of an objective inquiry into Fourth Amendment intrusions without abandoning judicial review of discretionary police action.

II. The "Would Have" Test Is The Only Standard That Places Any Practical Limitation On Police Discretion.

The Court of Appeals acknowledged that petitioners raise "legitimate concerns regarding police conduct" but concluded that the requirement that the police have probable cause of a traffic violation or reasonable suspicion of unlawful conduct before effecting a traffic stop properly "restrain[s] police behavior." Whren, 53 F.3d at 376. This protection is illusory. As a practical matter, the test applied in the majority of circuits subjects motorists driving in those jurisdictions "to unfettered governmental intrusion every time [they] ente[r] an automobile." Delaware v. Prouse, 440 U.S. 648, 663 (1979).

"The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials, including law enforcement agents, in order to 'safeguard the privacy and security of individuals against arbitrary invasions'" Prouse, 440 U.S. at 653-54 (citations omitted). Yet the "could have" test insulates, and in fact encourages, police arbitrariness by allowing officers to pick and choose from among the innumerable minor traffic violations they witness every day those that they

will enforce based on wholly improper criteria. Without "standardized police procedures that limit discretion" the decision whether to stop a particular citizen for a particular violation may "tur[n] on no more than . . . 'the price of our automobiles, the formality of our dress, the shortness of our hair or the color of our skin.'" Guzman, 864 F.2d at 1516, quoting Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 416 (1974). See also Scopo, 19 F.3d at 786 (Newman, J., concurring); 1 W. LaFave, Search and Seizure § 1.4(e) at 28 (1995 Supp.) (the "poorly reasoned decisions" rejecting the "would have" test "have conferred upon the police virtual carte blanche to stop people because of the color of their skin or for any other arbitrary reason"). There can be little doubt that this risk is real.

As the old adage warns, the more things change, the more they remain the same. In Montgomery, Alabama, on January 26, 1956, police officers arrested and jailed Dr. Martin Luther King, Jr. for allegedly driving thirty miles per hour in a twenty-five mile per hour zone. [citation omitted] Today, everyone readily acknowledges the police officers stopped, arrested, jailed and harassed Dr. King because he was an African-American and because he actively and vigorously sought equal protection and equal treatment for African-Americans.

United States v. Harvey, 16 F.3d 109, 114 (6th Cir.) (Keith, J., dissenting, where officer testified that he stopped car in part because it fit his own personal drug trafficker profile: "There were three young black male occupants in an old vehicle"), cert. denied, 115 S. Ct. 258 (1994). See also State v. Arroyo, 796 P.2d 684, 688 (Utah 1990) (noting trooper's admission that "[a]s a result [of] training at [a] seminar, . . . whenever he observed an Hispanic individual driving a vehicle he wanted to stop that

vehicle" and that "once he stopped an Hispanic driver, 80% of the time he requested permission to search the vehicle").

Because it is virtually impossible to operate a motor vehicle without committing some minor breach of the traffic code, allowing any traffic violation to automatically justify any stop is just one step removed from the completely discretionary permit checks of the type invalidated by this Court in Prouse. Before this Court's decision in Prouse, officers were free to single out motorists on any improper criteria and stop them on the spot. The "could have" test allows officers to single out the very same motorists on the same improper criteria and follow them until the officers catch them in violation of some subsection of the traffic code -- no matter how minor or obscure -- for which no reasonable officer in those circumstances would effect a stop, and then stop them.

"[G]iven the pervasiveness of such minor offenses and the ease with which law enforcement agents may uncover them in the conduct of virtually everyone, [the requirement of a traffic violation] hardly matters, for . . . there exists 'a power that places the liberty of every man in the hands of every petty officer,' precisely the kind of arbitrary authority which gave rise to the Fourth Amendment."

Guzman, 864 F.2d at 1516 (quoting 1 W. LaFare, Search and Seizure § 1.4(e) at 95 (2d ed. 1987), quoting 2 L. Wroth & H. Zobel, Legal Papers of John Adams 141-42 (1965)).

Indeed, this case provides a window on the possibilities for abuse. The Court of Appeals concluded that one proper basis for the stop was Mr. Brown's violation of 18 D.C.M.R. Vehicle and Traffic Regulations § 2213.4, under which an operator "shall, when operating a vehicle, give full time and attention to the operation

of the vehicle." Whren, 53 F.3d at 376. Armed with the "full time and attention" regulation and the "could have" Fourth Amendment standard, an officer could stop any car, anytime, on any improper basis, simply by waiting for the driver to change the radio station, turn to speak to a passenger, read a roadside billboard, or pause briefly at a stop sign to look at a map. With traffic regulations this subjective and nitpicking on the books, the probable cause/reasonable suspicion standards alone are ineffective to check police abuse.

The experience in the Fifth Circuit illustrates the way in which the "could have" test permits police abuse and then insulates it from judicial review. In United States v. Roberson, 6 F.3d 1088, 1092 (5th Cir. 1993), cert. denied, 114 S. Ct. 1322 (1994), a Texas state trooper pulled to the shoulder and turned off his lights to observe a van with out-of-state plates and four black occupants. When the van changed lanes (without signalling) in order to give room to the patrol car, the officer stopped the van, obtained consent to search, and found drugs. The Fifth Circuit noted that the arrests of these motorists were part of this particular officer's "remarkable record" for warrantless drug arrests after traffic stops (about 250 of them in five years). "Indeed, this court has become familiar with Trooper Washington's propensity for patrolling the fourth amendment's outer frontier." Id. It is troubling to contemplate how many innocent motorists Trooper Washington had to stop -- and what criteria he used to choose them -- in order to net those 250 drug possessors. Yet,

citing the sharply divided en banc decision in Causey, the Fifth Circuit was forced to conclude that its hands were tied (id.):

Hence, while we do not applaud what appears to be a common practice of some law enforcement officers to use technical violations as a cover for exploring more serious violations, we may look no further than the court's finding that Trooper Washington had a legitimate basis for stopping the van.⁷

Here, the trial judge implied that she did not necessarily consider the officers' actions reasonable ("[the stop] may not be what some of us believe should be done, or when it should be done, or how it should be done"), but felt constrained to uphold the stop as long as the officers had witnessed some -- any -- technical traffic violation. The trial court's comments highlight the way in which the "could have" test "negates any reasonableness inquiry," Harvey, 16 F.3d at 113 (Keith, J., dissenting). A stop that prompts a federal judge to question its "should," "when" and "how," is likely to be the very sort of "unreasonable" stop that is prohibited by the Fourth Amendment. Yet the trial court mentioned its concerns almost as an aside, apparently feeling powerless to make the kind of reasonableness determination that the Fourth Amendment demands. The "would have" test would not prohibit pretextual traffic stops in general. But it would give courts the authority to strike down the unreasonable ones.

⁷ See also Johnson, 1995 U.S.App. LEXIS 22658, *17 (accepting "abus[e] [of the pretextual stop rules] by the authorities" as "inherent in the nature of law enforcement"); United States v. Cardona-Rivera, 904 F.2d 1149, 1153-54 (7th Cir. 1990) (police testimony that stop was for traffic violations was "not worthy of belief" but stop would be upheld under Trigg test even if there were no other basis for stop).

III. This Traffic Stop Was Objectively Unreasonable Because No Reasonable Officer Would Have Made It.

Under this Court's decision in Scott, a pretextual action by a police officer is valid only if "the circumstances, viewed objectively, justify [the officer's] action." 436 U.S. at 138. Where, under the circumstances, no reasonable officer would have taken a particular action, that action is not "objectively justified" under the Scott standard.

The government has never disputed that Officers Soto and Littlejohn violated General Order 303.1(A)(2)(a) when they took traffic enforcement action while on plainclothes duty in an unmarked vehicle.⁸ In fact, the government never disputed that no reasonable officer in those circumstances "would have" effected this traffic stop. Indeed, it is obvious that no reasonable police officer would stop a motorist in direct violation of police regulations: By definition, it is "unreasonable" to violate the regulations that govern the conduct of one's public duties.

The fact that the stop here was made in violation of such a regulation is directly relevant to the essential "reasonableness" inquiry under the Fourth Amendment. Under Terry v. Ohio, 392 U.S. 1, 21-22 (1968), the question for the Court in evaluating the

⁸ Soto's testimony leaves no room to argue that the Pathfinder's actions were within the regulation's exception for grave safety threats. Tr. 72-73 (Pathfinder's violations were not of reckless or dangerous nature and warranted only a "warning," not a ticket). The Court of Appeals did not explicitly address petitioners' argument below that, because this stop was not "objectively authorized" under local police regulations, e.g., Trigg, 878 F.2d at 1041, and, indeed, was explicitly prohibited by such regulations, the stop could not pass muster under even the lax "could have" test.

legality of a stop is "would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" One of the "facts available to the officers" in this case was that they were forbidden by police regulations to take traffic enforcement action against the Pathfinder. In light of that fact, a reasonable officer would not believe that stopping the Pathfinder for a minor traffic offense was "appropriate."

As the six dissenters pointed out in the Fifth Circuit's Causey decision, in analyzing Fourth Amendment claims, this Court has repeatedly inquired whether standard police procedures were followed. Causey, 834 F.2d at 1187, citing, e.g., Colorado v. Bertine, 479 U.S. 369, 372 (1987); South Dakota v. Opperman, 428 U.S. 364, 376 (1976). "The emphasis on following standard procedures accords with the principles set forth in Scott. When standard practices . . . are followed, the police are acting in a fashion that is reasonable, objectively viewed, even if they have an ulterior motive. Here, the police were clearly not following standard procedures. . . . Their deviation from their usual practice without just cause made their conduct arbitrary." Causey, 834 F.2d at 1187, 1188. See also United States v. Robinson, 414 U.S. 218, 221 n.1 (1973) (indicating that "a departure from established police department practice" might be relevant to a pretextual traffic arrest claim); 1 W. LaFare, Search and Seizure § 1.4(e) at 94 (2d ed. 1987) ("It is the fact of the departure from the accepted way of handling such cases [rather than the reason for

it] which makes the officer's conduct arbitrary, and it is the arbitrariness which in this context constitutes the Fourth Amendment violation").'

The "would have" standard merely recognizes that there are some circumstances under which it is not objectively reasonable to stop a car for a particular traffic violation -- for example, when police regulations prohibit the stop. By judging an officer's conduct by what would be expected of a "reasonable officer," the standard petitioners urge this Court to adopt does no more than hold the police to the classic Fourth Amendment test of reasonableness.

' This Court's decision in United States v. Villamonte-Marquez, 462 U.S. 582, 584 n.3 (1983), relied upon by several of the "could have" courts, sheds no light on the issue presented by this petition. The defendants in that case argued unsuccessfully that customs officers could not rely on a special statute allowing suspicionless boarding to inspect a vessel's documentation because the officers were accompanied by state police and were following a tip concerning a vessel in the area carrying drugs. There was no indication in that case that the boarding was in any way a departure from standard customs practice.

The Villamonte-Marquez Court explicitly refused to apply Prouse in the unique context of waterborne vessels, approving the wholly discretionary stops of ships that are clearly forbidden of automobiles. Id. at 588-593. Having approved stops of ships for no reason, the Court was obviously not concerned about pretextual reasons that might give officials an unconstitutional degree of discretion. In any event, nothing in the Court's observation that "[w]e would see little logic in sanctioning such examinations of ordinary, unsuspect vessels but forbidding them in the case of suspected smugglers," id. at 584 n.3 (citation omitted), is at all inconsistent with a "would have" test for pretextual traffic stops. The Court's observation assumes that the stop at issue was one that would have been made of an "ordinary, unsuspect vessel." Under the "would have" test, whether a traffic stop is valid or invalid depends not at all on whether the vehicle stopped was suspected of another crime.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that this Court grant their Petition for a Writ of Certiorari.

Respectfully submitted,

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FEDERAL PUBLIC DEFENDER

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A P P E N D I X

706, 103 S.Ct. 2132, 2149, 76 L.Ed.2d 236 (1983). The statute also grants the Board the power to qualify a prisoner's release on whatever "terms and conditions" the Board sees fit to impose. Unlike the statutes at issue in *Greenholts* and *Allen*, the District of Columbia Code under no circumstances compels the Board to grant a prisoner release. It therefore creates no "expectancy of release" entitling a prisoner to due process protections. Accordingly, the motions for summary affirmance are granted and the judgment of the district court

Affirmed.



UNITED STATES of America, Appellee

v.

Michael A. WHREN, Appellant.

Nos. 94-3012, 94-3017.

United States Court of Appeals,
District of Columbia Circuit.

Argued Feb. 13, 1995.

Decided May 12, 1995.

Defendant was convicted in the United States District Court for the District of Columbia, Norma Holloway Johnson, J., of possession with intent to distribute 50 grams or more of cocaine base, possession with intent to distribute cocaine base within 1,000 feet of school, possession of marijuana, and possession of phencyclidine (PCP), and he appealed. The Court of Appeals, Sentelle, Circuit Judge, held that: (1) police officers who observed automobile containing defendant commit three traffic violations had articulable and specific facts necessary to establish probable cause to stop automobile, and (2) convictions for both possession with intent to distribute cocaine base within 1,000 feet of school, and its lesser included offense, possession with intent to distribute cocaine

base, required remand for entry of amended judgment and resentencing.

Affirmed and remanded.

1. Automobiles ¶349(2.1)

Traffic stop constitutes limited seizure within meaning of Fourth Amendment, and so must be justified by probable cause or, at least, reasonable suspicion of unlawful conduct, based on specific and articulable facts. U.S.C.A. Const.Amend. 4.

2. Arrest ¶63.5(6)

Searches and Seizures ¶60.1

In context of automobile stops and searches, court must look to objective circumstances in determining legitimacy of police conduct under Fourth Amendment. U.S.C.A. Const.Amend. 4.

3. Automobiles ¶349.5(3)

Regardless of whether police officer subjectively believes that occupants of automobile may be engaging in some other illegal behavior, traffic stop of automobile is permissible as long as reasonable officer in same circumstances could have stopped car for suspected traffic violation. U.S.C.A. Const. Amend. 4.

4. Automobiles ¶349(2.1)

Police officers who observed automobile containing defendant commit three traffic violations had articulable and specific facts necessary to establish probable cause to stop automobile, and so evidence seized during stop was admissible. U.S.C.A. Const.Amend. 4.

Appeals from the United States District Court for the District of Columbia, Nos. 93-cr00274, 93-cr00274-02.

Lisa D. Burget, Asst. Federal Public Defender, argued the cause for appellant Michael A. Whren. With her on the briefs was A.J. Kramer, Federal Public Defender.

G. Allen Dale argued the cause and filed the brief for appellant James L. Brown.

Margaret M. Lawton, Asst. U.S. Atty., argued the cause for appellee. With her on the

brief were Eric H. Holder, Jr., U.S. Atty., John R. Fisher, Frederick W. Yette and Thomas C. Black, Asst. U.S. Attys.

Before BUCKLEY, WILLIAMS and
SENTELLE, Circuit Judges.

SENTELLE, Circuit Judge:

Appellants Michael Whren and James Lester Brown challenge their convictions for federal drug offenses, asserting, among other things, that the District Court erred in denying their motions to suppress physical evidence. Appellants contend that police officers obtained evidence as a result of an illegal search and seizure in violation of appellants' Fourth Amendment rights. Appellants also challenge their convictions and sentences for possession with intent to distribute cocaine base under 21 U.S.C. § 841 (1988), arguing that section 841 is a lesser-included offense of their separate convictions for possession with intent to distribute cocaine base within 1000 feet of a school under 21 U.S.C. § 860(a) (1988). While we reject appellants' Fourth Amendment challenges and otherwise affirm appellants' convictions, we remand for resentencing pursuant to the parties' agreement that section 841 is a lesser-included offense of a section 860(a) offense.

I. BACKGROUND

On July 8, 1993, a federal grand jury returned a four-count indictment against appellants Michael Whren and James Lester Brown, charging appellants with (1) possession with intent to distribute 50 grams or more of cocaine base, or crack, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A)(iii) (Count One); (2) possession with intent to distribute cocaine base within 1000 feet of a school in violation of 21 U.S.C. § 860(a) (Count Two); (3) possession of a controlled substance (marijuana) in violation of 21 U.S.C. § 844(a) (Count Three); and (4) possession of a controlled substance (phencyclidine ("PCP")) in violation of 21 U.S.C. § 844(a) (Count Four). Following a pre-trial suppression hearing to consider appellants' claim that evidence was seized as a result of a police stop and seizure which violated appellants' Fourth Amendment rights, the Dis-

trict Court denied appellants' motions to suppress physical evidence. After a subsequent jury trial, the jury found appellants guilty on all four counts.

A. The Suppression Hearing

The District Court heard extensive evidence in considering appellants' Fourth Amendment claim. The government presented as witnesses the arresting officers, who testified about the events surrounding appellants' arrest. On the evening of June 10, 1993, District of Columbia police officers Efrain Soto, Jr., Homer Littlejohn and several other plainclothes vice officers were patrolling for drug activity in the area of Minnesota Avenue and Ely Place, in Southeast Washington, in two unmarked cars. Officers Soto and Littlejohn were in a car driven by another officer, Investigator Tony Howard.

Soto testified that as the officers turned left off of 37th Place onto Ely Place heading north, he noticed a dark colored Nissan Pathfinder with temporary tags at the stop sign on 37th Place. Soto observed the driver, later identified as Brown, looking down into the lap of the passenger, Whren. Soto testified that at least one car was stopped behind the Pathfinder. As the officers proceeded slowly onto 37th Place, Soto continued to watch the Pathfinder, which Soto testified remained stopped at the intersection for more than twenty seconds obstructing traffic behind it. Investigator Howard had already begun to make a U-turn to tail the Pathfinder when Soto instructed him to follow it. As the officers turned to tail the vehicle, appellants turned west onto Ely Place without signalling and, as Soto testified, "sped off quickly." Soto further testified that the Pathfinder proceeded at an "unreasonable speed."

The officers followed the Pathfinder onto Ely Place, until it stopped at the intersection of Ely Place and Minnesota Avenue, surrounded by several cars in front of it, two behind it, and several to its right. The officers pulled into the eastbound lane of traffic parallel to the Pathfinder on the driver's side. Officer Soto then immediately exited his vehicle and approached the driver's side of the Pathfinder, identifying himself as a

police officer. Officer Littlejohn followed a few steps behind and to the right of Soto.

After noticing that appellants could not pull over because of parked cars to their right, Soto told appellant Brown to put the Pathfinder in park. As he was speaking, Soto noticed that appellant Whren was holding a large clear plastic bag of what the officer suspected to be cocaine base in each hand. Soto yelled "C.S.A." to notify the other officers that he had observed a Controlled Substances Act violation. He testified that, as he reached for the driver's side door, he heard Whren yell "pull off, pull off," and observed Whren pull the cover off of a power window control panel in the passenger door and put one of the large bags into the hidden compartment therein. Soto opened the door, dove across Brown and grabbed the other bag from Whren's left hand. Officer Littlejohn pinned Brown to the back of the driver's seat so that he could not move.

Multiple officers then placed appellants under arrest and searched the Pathfinder at the scene. The officers recovered two tin-foils containing marijuana laced with PCP, a bag of chunky white rocks and a large white rock of crack cocaine from the hidden compartment on the passenger side door, numerous unused ziplock bags, a portable phone and personal papers.

Defense attorneys pressed the arresting officers on their reasons for making the stop. Soto stated that the driver of the vehicle was "not paying full time and attention to his driving." Soto testified that he did not intend to issue a ticket to the driver for stopping too long at the stop sign, but he wished to stop the Pathfinder to inquire why it was obstructing traffic and why it sped off without signalling in a school area. He testified that the decision to stop the Pathfinder was not based upon the "racial profile" of the appellants, but rather on the actions of the driver. Officer Littlejohn's testimony differed only slightly from Soto's with respect to the hand from which Soto seized the drugs, but otherwise confirmed Soto's account.

B. The District Court's Suppression Ruling

After hearing the evidence and appellants' argument that the traffic stop was pretextual and thus violated the Fourth Amendment, the District Court denied appellants' motions to suppress the physical evidence. Although the court noted some minor discrepancies between testimony by Littlejohn and Soto, it noted that

the one thing that was not controverted ... is the facts surrounding the stop. There may be different ways in which one can interpret it but, truly, the facts of the stop were not controverted. There was nothing to really demonstrate that the actions of the officers were contrary to a normal traffic stop. It may not be what some of us believe should be done, or when it should be done, or how it should be done, but the facts stand uncontroverted, and the court is going to accept the testimony of Officer Soto.

The court thus concluded that "the government has demonstrated through the evidence presented that the police conduct was appropriate and, therefore, there is no basis to suppress the evidence."

C. The Convictions and the Appeal

Following the court's pre-trial suppression ruling, trial proceeded, and appellants were convicted on all four counts. On January 26, 1994, appellant Whren was sentenced to 168 months incarceration and five years supervised release on count one, 168 months incarceration and ten years supervised release on count two, one year imprisonment and one year supervised release on each of counts three and four. All terms were to be served concurrently. Whren was also assessed a fine of \$8,800 on each count, all fines to be concurrent with count two, and a special assessment of \$150. On February 9, 1994, appellant Brown was sentenced to 168 months incarceration and ten years supervised release on count one, 168 months incarceration and five years supervised release on count two, one year imprisonment and one year supervised release on each of counts three and four, all terms to be served concurrently, and a \$150 special assessment.

Whren and Brown appeal their convictions and sentences, raising several challenges. Although we have accorded each alleged error full consideration, we believe several do not merit separate discussion. For those challenges to appellants' convictions not discussed specifically herein, we reject appellants' arguments. We thus turn our attention to the two arguments we believe merit separate discussion: (1) that the District Court erred in denying their motions for suppression of physical evidence under the Fourth Amendment; and (2) that count one of appellants' indictment is a lesser-included offense of count two.

II. DISCUSSION

Appellants contend that the District Court erred in denying their motions to suppress physical evidence seized as a result of the traffic stop on June 10, 1993. They argue that the police officers used the alleged traffic violations as a pretext for what in actuality was a search for drugs without probable cause; thus, the search was objectively unreasonable under the Fourth Amendment. Although appellants recognize that this circuit has faced similar circumstances in *United States v. Mitchell*, 951 F.2d 1291 (D.C. Cir. 1991), *cert. denied*, 504 U.S. 924, 112 S.Ct. 1976, 118 L.Ed.2d 576 (1992), they contend that *Mitchell* did not adopt a standard with sufficient specificity to govern this case. Appellants assert that *Mitchell* merely requires a court to "look to objective circumstances ... rather than an officer's state of mind," in determining the legitimacy of police conduct. *Mitchell*, 951 F.2d at 1295. Here, they contend that the objective circumstances did not justify the stop.

Appellants argue that this court should borrow from the law of other circuits in determining whether "objective circumstances" warrant a search. While several circuits hold that an alleged pretextual stop is valid as long as an officer legally "could have" stopped the car in question because of a suspected traffic violation, see, e.g., *United States v. Scopa*, 19 F.3d 777, 782-84 (2d Cir.), *cert. denied*, — U.S. —, 115 S.Ct. 207, 130 L.Ed.2d 136 (1994); *United States v. Hassan El*, 5 F.3d 726, 730 (4th Cir.1993), *cert. de-*

nied, — U.S. —, 114 S.Ct. 1374, 128 L.Ed.2d 50 (1994), appellants urge the court to adopt the test laid out by the Tenth and Eleventh Circuits, which have held that a stop is valid only if "under the same circumstances a reasonable officer would have made the stop in the absence of the invalid purpose." *United States v. Smith*, 799 F.2d 704, 709 (11th Cir.1986) (emphasis added); see *United States v. Gorman*, 864 F.2d 1512, 1517 (10th Cir.1988). Appellants contend that the "would have" test is superior to the "could have" test because the latter fails to place any reasonable limitations on discretionary police conduct, thus "cut[ting] at the heart of the Fourth Amendment." Brief of Appellant Whren at 22.

Finally, appellants assert that the District Court erred in convicting them for violation of 21 U.S.C. § 841 as well as 21 U.S.C. § 860(a), because the former is a lesser-included offense of the latter.

A. The Traffic Stop and Search

[1,2] The Fourth Amendment to the U.S. Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...." U.S. CONST. amend. IV. The Amendment imposes "a standard of 'reasonableness' upon the exercise of discretion by government officials." *Delaware v. Prouse*, 440 U.S. 648, 653-54, 99 S.Ct. 1391, 1395, 59 L.Ed.2d 660 (1979). Because an ordinary traffic stop constitutes a limited seizure within the meaning of the Fourth Amendment, *Prouse*, 440 U.S. at 653, 99 S.Ct. at 1395-96, such action must be justified by probable cause or, at least, reasonable suspicion of unlawful conduct, based upon specific and articulable facts. See *Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868, 1880, 20 L.Ed.2d 889 (1968). In the context of automobile stops and searches, a court "must look to objective circumstances in determining the legitimacy of police conduct under the Fourth Amendment." *Mitchell*, 951 F.2d at 1295.

In claiming that this court should adopt the "would have" test for determining whether objective circumstances exist to warrant an automobile stop and subsequent search,

appellants argue that pretextual stops are objectively unreasonable because, under the same circumstances, an officer without ulterior purposes would not have stopped the offenders. However, "[e]ven if we agreed that the stop was a mere pretext for a search, that does not mean that a violation of the Fourth Amendment has occurred." *Mitchell*, 951 F.2d at 1295.

Mitchell provides strikingly similar facts to this case. In *Mitchell*, a D.C. police officer, Stone, observed the two defendants, Mitchell and Zollicoffer, drive at a "high rate of speed," stop suddenly, and turn sharply without signalling. *Id.* at 1293. Stone gave chase and pulled their car over after brief pursuit. When Stone went to the window of the car, he had not yet decided whether to issue a citation. As he returned to his car to run a check on the driver, an assisting officer noticed Zollicoffer leaning forward in the passenger seat with his hands inside his coat, as if holding a weapon. The officer ordered the defendants out of the car, searched them, and found weapons on each. *Id.* at 1293-94. Mitchell and Zollicoffer moved to suppress tangible evidence recovered during the stop, but the trial court denied their motions to suppress. *Id.* at 1294.

Against appellants' arguments that the stop was an unlawful pretext to search, this court affirmed. *Id.* at 1299. We reasoned that "[t]he Fourth Amendment does not bar the police from stopping and questioning motorists when they witness or suspect a violation of traffic laws, even if the offense is a minor one." *Id.* at 1295. Officer Stone had observed two of the violations observed by Officer Soto in this case: speeding and turning without a signal. *Id.* Like Officer Soto, Officer Stone had not yet decided whether to issue a citation, but we held that his indecision "does not vitiate the justification for the initial stop." *Id.* In applying the "objective circumstances" test, we noted that "[e]ven a relatively minor offense that would not of itself lead to an arrest can provide a basis for a stop for questioning and inspection of the driver's permit and registration." *Id.* (quoting *United States v. Montgomery*, 561 F.2d 875, 880 (D.C. Cir. 1977)). Presented with the fact that the officer had observed the traffic

violations, the court concluded that "objective circumstances clearly justified stopping the car." *Id.*

[3] In holding that a traffic stop is reasonable as long as the officer has observed traffic violations by the defendant, *Mitchell* implicitly adopts the standard embraced by the majority of courts which have considered the "pretext" issue. That is, regardless of whether a police officer subjectively believes that the occupants of an automobile may be engaging in some other illegal behavior, a traffic stop is permissible as long as a reasonable officer in the same circumstances could have stopped the car for the suspected traffic violation. See *United States v. Scopo*, 19 F.3d at 784 ("[W]here the arresting officer had probable cause to believe that a traffic violation occurred or was occurring in the officer's presence, and was authorized by state or municipal law to effect a custodial arrest for the particular offense, the resulting arrest will not violate the fourth amendment."); *United States v. Hassan El*, 5 F.3d at 730 ("[W]hen an officer observes a traffic offense or other unlawful conduct, he or she is justified in stopping the vehicle under the Fourth Amendment."); *United States v. Ferguson*, 8 F.3d 385, 392 (6th Cir. 1993) (in banc) ("[T]raffic stops based on probable cause, even if other motivations existed, are not illegal"), cert. denied, — U.S. —, 115 S.Ct. 97, 130 L.Ed.2d 47 (1994).

We thus reject appellants' suggestion that we adopt the more open-ended "would have" standard of the Tenth and Eleventh Circuits. See *United States v. Smith*, 799 F.2d at 709 (11th Cir. 1986); see also *United States v. Gusman*, 864 F.2d at 1517 (10th Cir. 1988). The objective "could have" standard provides a more principled method of determining reasonableness for two primary reasons. First, it eliminates the necessity for the court's inquiring into an officer's subjective state of mind, in keeping with the Supreme Court's admonitions that Fourth Amendment inquiries depend "on an objective assessment of the officers' actions in light of the facts and circumstances confronting him at the time . . . and not on the officer's actual state of mind at the time the challenged action was taken." *Maryland v. Macon*, 472 U.S. 463,

470-71, 105 S.Ct. 2778, 2783, 86 L.Ed.2d 370 (1985). At the same time, in response to appellants' legitimate concerns regarding police conduct, the "could have" test provides a principled limitation on abuse of power. Officers cannot make a traffic stop unless they have probable cause to believe a traffic violation has occurred or a reasonable suspicion of unlawful conduct based upon articulable facts—requirements which restrain police behavior. Cf. *Delaware v. Prouse*, 440 U.S. at 661, 99 S.Ct. at 1400.

[4] Applied to the facts of this case, the objective test adopted in *Mitchell* suggests that Officers Soto and Littlejohn had sufficient grounds to stop appellants. The District Court credited the testimony of Soto, who observed three traffic violations when appellant failed to give "full time and attention" to his driving, see Title 18 D.C.M.R. Vehicle and Traffic Regulations § 2213.4, turned without signalling, see *id.* at § 2204.3, and drove away at an unreasonable speed. That factual finding is not clearly erroneous. See *United States v. Taylor*, 997 F.2d 1551, 1553 (D.C. Cir. 1993) (district court's findings of fact reviewed for clear error). Having seen those violations, Soto had the articulable and specific facts necessary to establish probable cause to stop appellants. See *Mitchell*, 951 F.2d at 1295; *Hassan El*, 5 F.3d at 729-30; *Scopo*, 19 F.3d at 781. Our inquiry goes no further.

We wish to make one point clear in applying the *Mitchell* standard. The *Mitchell* test ensures that the validity of the traffic stop "is not subject to the vagaries of police departments' policies and procedures." *Ferguson*, 8 F.3d at 392. That is, whether a stop can be made depends on whether the officers had an objective legal basis for it, not on whether the police department assigned the officer in question the duty of making the stop. See *Hassan El*, 5 F.3d at 730 (rejecting defendant's argument that stop was unreasonable because particular arresting officers were plainclothes officers assigned to narcotics duty, not traffic duty). In this instance, it is of no moment that Soto and Littlejohn were vice officers patrolling for drug violations rather than traffic police. When they observed a traffic violation, they,

as officers of the law, were constitutionally justified in stopping appellants.

Accordingly, we reject appellants' Fourth Amendment arguments. Because appellants challenge only the stop and not the subsequent search of the Pathfinder, we need inquire no further. We conclude that the District Court properly denied appellants' motions to suppress.

B. The Lesser-Included Offense.

Appellants contend that their convictions for violation of 21 U.S.C. § 841(a)(1), which proscribes possession with intent to distribute controlled substances, including cocaine base, should be vacated because that section describes a lesser-included offense of 21 U.S.C. § 860(a), which proscribes possession with intent to distribute a controlled substance within one thousand feet of a school. Appellants rely on *United States v. Williams*, 782 F.Supp. 7, 8-9 (D.D.C. 1992), *aff'd without opinion*, 6 F.3d 829 (D.C. Cir. 1993), in which the District Court concluded that section 841 offenses were, in fact, lesser included offenses of section 860(a) offenses. The government agrees with appellants' argument. Consequently, pursuant to the agreement of the parties, we will remand to the District Court for entry of an amended judgment and resentencing on Counts One and Two.

III. CONCLUSION

United States v. Mitchell dictates that police conduct in this case was reasonable. When a police officer observes a traffic violation, his subsequent stop of the vehicle is reasonable because it is supported by probable cause. We thus reject appellants' Fourth Amendment arguments, as well as all claims not discussed specifically herein. We remand, however, for entry of an amended judgment and resentencing only with respect to Part II.B. above.



United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-3012

September Term, 1994
USDC Crim. No. 93-0274

United States of America

v.

Michael A. Whren,

Appellant

and Consolidated Case No. 94-3017

UNITED STATES
FOR DISTRICT OF COLUMBIA
FILED

JUL 13 1995

CLERK

BEFORE: Buckley, Williams, and Sentelle, Circuit Judges

ORDER

Upon consideration of Appellants' Joint Petition for Rehearing, filed June 26, 1995, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Robert A. Bonner
Robert A. Bonner
Deputy Clerk

JUL 8

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-3012

September Term, 1994

United States of America

v.

Michael A. Whren,

Appellant

and Consolidated Case No. 94-3017

UNITED STATES
FOR DISTRICT OF COLUMBIA CIRCUIT
FILED

JUL 13 1995

CLERK

BEFORE: Edwards, Chief Judge; Wald, Silberman, Buckley, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers and Tatel, Circuit Judges

ORDER

Appellants' Joint Suggestion For Rehearing In Banc has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

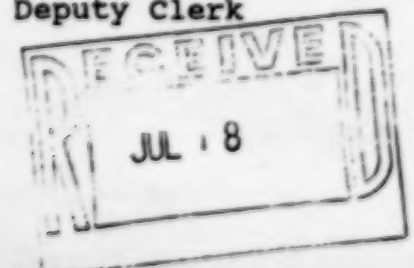
ORDERED, by the Court in banc, that the suggestion is denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Robert A. Bonner
Robert A. Bonner
Deputy Clerk



IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

MICHAEL A. WHREN

and

JAMES L. BROWN,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ORIGINAL

CERTIFICATE OF SERVICE

Lisa B. Wright, a member of the bar of this Court, certifies pursuant to Rule 29 of this Court, that on August 31, 1995, she served the within MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT on counsel for respondent by depositing three copies of said motion and petition in the United States mail at Washington, D.C., first-class postage prepaid, addressed to:

Honorable Drew S. Days, III
Solicitor General of the United States
Department of Justice, Room 5143
Washington, D.C. 20530

All parties required to be served have been served.

Lisa B. Wright

LISA B. WRIGHT
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